Supreme Court, U.S.
FILED
DEC 21 1998
OFFICE OF THE CLERK

No. 98-815

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

BROWNING-FERRIS INDUSTRIES
OF COLORADO, INC.,

Petitioner,

vs.

THOMAS H. DECKER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COLORADO SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

STEFAN KAZMIERSKI
Colorado Reg. No. 18234
Counsel of Record
ROSEMAN & KAZMIERSKI, LLC
Attorneys for Respondent
899 Logan Street
Suite 203
Denver, CO 80203
(303) 839-1771

150312

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

	Page
Table of Cited Authorities	ii
Statement of Jurisdiction	1
Statement of the Case	4
Reasons for Denying the Writ	6
Conclusion	9

TABLE OF CITED AUTHORITIES

Page

Cases:

Adams v. Robertson, 520 U.S. 83 (1997) 6

Continental Air Lines, Inc. v. Keenan, 731 P.2d 708 (Colo. 1987) 8

Grover v. Industrial Comm'n, 759 P.2d 705 (Colo. 1988) 3

Jankovich v. Indiana Toll Road Comm., 379 U.S. 487 (1891) 8

Missouri v. Jenkins, 496 U.S. 33 (1990) 1

Moore v. Moore, 215 Ga. 47, 108 S.E. 2d 704 (1959) . 3

Mortgage Finance, Inc. v. Podleski, 742 P.2d 900 (Colo. 1987) 8

Ricci v. Davis, 627 P.2d 1111 (Colo. 1981) 8

Trimble v. City and County of Denver, 697 P.2d 716 (Colo. 1985) 5

United States Constitution:

Fourteenth Amendment 4

Cited Authorities

Rules:	*Page*
Colorado Appellate Rule 54(b)	2, 3
Supreme Court Rule 13.1	1, 4

STATEMENT OF JURISDICTION

This Court lacks jurisdiction to review the judgment below for three reasons. First, the petition for writ of certiorari is untimely since the Colorado Supreme Court denied certiorari more than 90 days before Browning Ferris Industries of Colorado, Inc. ("BFI") filed its petition in this Court. Second, the Colorado Supreme Court was without jurisdiction to consider BFI's Combined Petition for Rehearing and Motion for Relief for Denial of Federal and State Constitutional Rights, because there is no procedure for a petition for rehearing from a denial of certiorari review in Colorado. Third, the Colorado Supreme Court ordered that the petition for rehearing be stricken, not denied.

The Colorado Supreme Court denied BFI's petition for writ of certiorari on July 27, 1998. Supreme Court Rule 13.1 requires that a petition for a writ of certiorari be filed "within 90 days after entry of the order denying discretionary review." BFI filed its petition for a writ of certiorari in this Court on November 16, 1998, three weeks after its deadline had passed. The 90-day limit is mandatory and jurisdictional, and this Court has no authority to extend the period for filing except as Congress permits. *Missouri v. Jenkins*, 496 U.S. 33, 45 (1990). The writ was filed out of time and must be dismissed.

Supreme Court Rule 13.3 is not applicable to this case. That rule states that:

> [i]f a petition for rehearing is timely filed in the lower court by any party, the time to file a petition for a writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of the petition for rehearing.

The Colorado Appellate Rules allow a petition for rehearing only under limited circumstances and do not allow for a petition for rehearing after a denial of a writ of certiorari. The time for filing a petition for a writ of certiorari in this Court must run from the date of denial of certiorari review in the Colorado Supreme Court.

Colorado Appellate Rule 54(b) currently provides:

> **Denial of Writ.** No mandate shall issue upon the denial of a petition for writ of certiorari. Whenever application for a writ of certiorari to review a decision of any court is denied, the clerk shall enter an order to that effect, and shall forthwith notify the court below and counsel of record. If, after granting the writ, the court later denies the same as having been improvidently granted or renders decision by opinion of the court on the merits of the writ, petition for rehearing may be filed in accordance with the provisions of C.A.R. 40.

Under C.A.R. 54(b), a petition for rehearing may only be filed after the Colorado Supreme Court grants a writ and later determines it had been improvidently granted, or after an opinion on the merits of the writ. A petition for rehearing cannot be filed after the denial of a writ of certiorari.

The fact that a petition for rehearing is not permitted after a denial of a writ of certiorari in Colorado is also made evident by the amendments to C.A.R. 54(b). C.A.R. 54(b), effective March 30, 1970, read:

> **Denial of Writ.** No mandate shall issue upon the denial of a petition for writ of certiorari. Whenever application for a writ of certiorari to review a

> decision of any court is denied, the clerk shall enter an order to that effect, and shall forthwith notify the court below and counsel of record. *Such notification will not be withheld pending disposition of a petition for rehearing except by order of the court or of a justice thereof.* [Italicized portion deleted from later version of C.A.R. 54(b)].

C.A.R. 54(b) was amended on March 30, 1972 to delete any reference to a petition for rehearing after denial of a petition for certiorari, and it has not been further amended since that date. Just as the deletion of statutory language by the legislature renders the language inoperative and indicates that the legislature has admitted a different intent, *Grover v. Industrial Comm'n*, 759 P.2d 705, 710 (Colo. 1988), so has the deletion of any reference to a petition for rehearing on a denial of writ of certiorari indicated an intent to disallow such a pleading or procedure. The Colorado Supreme Court simply had no jurisdiction to review the Combined Petition.

That the Colorado Supreme Court had no jurisdiction to review the Combined Petition is made even more evident by the fact that the court did not deny the Combined Petition, but ordered it "stricken." App. A-1. The word "stricken" means eliminated from the record, not merely eliminated with a pen, or crossed out with a typewriter, and left in the record. *Moore v. Moore*, 215 Ga. 47, 108 S.E. 2d 704, 706 (1959). The striking of this pleading leaves the record as if the Combined Petition was never filed. Therefore, the 90-day period for BFI began to run on the date the Colorado Supreme Court denied its petition for writ of certiorari.

BFI confuses the jurisdictional issue by arguing that it seeks a writ to review the Colorado Supreme Court's Order, dated August 28, 1998, striking BFI's Combined Petition for

Rehearing and Motion for Relief. Petition at 1.[1] This argument presents several problems for BFI, not the least of which is Rule 13.1 itself. That Rule provides that the 90-day period runs from the date of entry of the order denying certiorari and not from the date that an improperly filed petition for rehearing is stricken.

More important, however, is the fact that BFI failed to raise any federal question in the lower courts until that time. BFI admits that it first raised a federal question in its stricken Combined Motion for Rehearing and Motion for Relief filed on August 10, 1998. Petition at 2, App. B. Yet all of BFI's arguments regarding deprivation of constitutional rights flow from its allegation that the Colorado Supreme Court's January 13, 1997 opinion violated the Fourteenth Amendment "by converting Respondent's claim for breach of the covenant of good faith and fair dealing from tort to contract." Petition at 23. BFI did not raise these arguments in a petition for rehearing of that opinion, in the proceedings on remand in the Colorado Court of Appeals, or in its petition for writ of certiorari from that court's second opinion in this case.

STATEMENT OF THE CASE

A chronology of relevant opinions and filings below, with references to the Appendix to BFI's petition, will assist the Court in determining the issues presented.

On July 15, 1993, a jury rendered a verdict in favor of Respondent on both of two claims for relief: 1) breach of progressive disciplinary contract; and 2) breach of express covenant of good faith and fair dealing. App. H-6. On December

1. BFI still could have filed a timely petition for writ of certiorari in this Court after that ruling by the Colorado Supreme Court. Its deadline for filing that petition was October 26, 1998.

12, 1995, the Colorado Court of Appeals affirmed liability on the breach of contract claim, but determined that no tort claim for breach of the express covenant of good faith and fair dealing existed and set aside the entire award. App. L.

On January 13, 1997, the Colorado Supreme Court also affirmed liability on the breach of contract claim and agreed that no tort claim existed. App. H-24, H-27. The court vacated the jury's verdict for punitive damages, holding that punitive damages cannot be awarded on a contract claim. App. H-25. It then reversed the order setting aside economic and noneconomic damages, finding that the jury was properly instructed on the elements of damages for a contract claim, and remanding to the court of appeals to consider BFI's argument that the economic loss award was excessive.[2] App. H-29, 30.

On October 23, 1997, the Colorado Court of Appeals reinstated the economic and noneconomic damages awards, finding them to be supported by the evidence. App. E. On July 27, 1998, the Colorado Supreme Court denied BFI's petition for writ of certiorari. App. C. On August 10, 1998, BFI filed its Combined Petition for Rehearing and Motion for Relief for Denial of Federal and State Constitutional Rights, in which it first raised any federal or constitutional question. App. B. On August 28, 1998, the Combined Petition was stricken by the Colorado Supreme Court. App. A.

The judgment from which BFI actually seeks review is the Colorado Supreme Court opinion of January 13, 1997, which recognized a claim sounding in contract for breach of an express covenant of good faith and fair dealing. App. H. All of BFI's

---

2. Noneconomic damages are recoverable in Colorado on a breach of contract claim if accompanied by willful and wanton conduct and if the damages are a natural and proximate consequence of such conduct. *Trimble v. City and County of Denver*, 697 P.2d 716, 731 (Colo. 1985).

points on certiorari, except its arguments as to amount of economic damages, arose on that date. BFI failed to raise any of its "constitutional" or "federal question" claims until it filed its Combined Petition for Rehearing and Motion for Relief for Denial of Federal and State Constitutional Rights on August 10, 1998. By August, 1998, this case had been remanded from the Colorado Supreme Court back to the Colorado Court of Appeals, and then had been taken up again to the Colorado Supreme Court on another petition for writ of certiorari. BFI never once raised any constitutional or federal question issues in any of the numerous briefs it filed along the way until *after* the denial of writ of certiorari on July 27, 1998.

REASONS FOR DENYING THE WRIT

With very rare exceptions, this Court will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision which this Court has been asked to review. *Adams v. Robertson*, 520 U.S. 83, 86 (1997). It is undisputed that the Colorado Supreme Court did not address the federal questions presented here. When the highest state court is silent on a federal question, this Court assumes that the issues were not properly presented, and the aggrieved party is required to bear the burden of defeating this assumption. *Ibid.* BFI has not carried its burden of showing that it properly presented any federal questions to the Colorado Supreme Court after its January 13, 1997 opinion recognizing a contract claim for breach of the express covenant of good faith and fair dealing.

BFI argues that "[h]ad the Colorado Supreme Court granted BFI's petition for certiorari on the issue presented, Appendix D-2, no federal constitutional injury, or question thereon, would have arisen in the first instance." Petition at 3. But the problem remains for BFI it never made any constitutional or federal

claim arguments until its improperly filed and stricken Combined Petition on August 10, 1998.

The only other issue in the instant writ, the propriety of the economic loss damage awards under the circumstances of this case, arose no later than October 23, 1997, when the Colorado Court of Appeals affirmed those awards. BFI still failed to raise a federal question in its petition for rehearing to that court or in its petition for writ of certiorari with the Colorado Supreme Court. Although BFI had ample opportunity to present these issues to the state courts below, it failed to do so in a timely manner. This Court should not review those issues now.

Even if this Court were to find that the petition herein was timely filed, and even if this Court were to excuse BFI's failure to present any federal question to the state courts below, the opinion of the Colorado Supreme Court at issue is sound, rests on adequate state grounds and does not impinge on any constitutional rights of BFI.

BFI's argument that it was denied procedural due process (*see* Petition at 23) is without merit. The Colorado Supreme Court recognized a contract claim for breach of the express covenant of good faith and fair dealing in its opinion of January 13, 1997. BFI had ample notice and opportunity to be heard on that issue both before the court entered its opinion, through its briefs and oral argument, and after that opinion in a petition for rehearing. It could have presented arguments on that issue on remand or in its petition for writ of certiorari after remand. It failed to do so. BFI's due process arguments are frivolous.

BFI further failed to note anywhere in its petition that both the Colorado Supreme Court and Colorado Court of Appeals affirmed the jury's verdict on Respondent's breach of contract

claim based on BFI's progressive disciplinary employment policy. The jury's award of punitive damages was vacated on the basis that punitive damages could not be awarded on contract claims under the circumstances of this case. *See Mortgage Finance, Inc. v. Podleski*, 742 P.2d 900 (Colo. 1987); App. H-24, 25. Therefore, only damages for breach of contract were affirmed, and those damages were supported separately by Respondent's claim for breach of BFI's progressive disciplinary employment policy. App. H-27.

Although BFI did not properly raise a federal constitutional issue in the state courts, those arguments undoubtedly would have been rejected since the damage awards were supported separately by a well established breach of contract claim. *See Continental Air Lines, Inc. v. Keenan*, 731 P.2d 708 (Colo. 1987). When a constitutional question is not essential to the resolution of an issue before the Colorado Supreme Court, that court will not address it. *See Ricci v. Davis*, 627 P.2d 1111 (Colo. 1981). Further, even if somehow the Colorado Supreme Court violated BFI's due process rights by recognizing a contract claim for breach of an express covenant of good faith and fair dealing in this case, this Court's jurisdiction would fail if the non-federal ground is independent of the federal ground and is adequate to support the judgment. *Jankovich v. Indiana Toll Road Comm.*, 379 U.S. 487, 489 (1891).

It is, of course, beyond argument that the Colorado courts are expected to define and further refine the common law through case law pronouncements. The Colorado Supreme Court did so in this case and did so in a manner that did not violate any constitutional rights of BFI, since liability had already been established on the breach of contract claim. The award complained of by BFI would have been affirmed even if the Colorado courts had reversed the jury's verdict based on breach of the express covenant of good faith and fair dealing.

CONCLUSION

This case does not merit further review by this Court. The petition should be denied.

Respectfully submitted,

STEFAN KAZMIERSKI
Colorado Reg. No. 18234
Counsel of Record
ROSEMAN & KAZMIERSKI, LLC
Attorneys for Respondent
899 Logan Street
Suite 203
Denver, CO 80203
(303) 839-1771